



November 14, 2000

Mr. Therold I. Farmer
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2000-4412

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 140750.

The Luling Independent School District (the "district"), which your law firm represents, received four requests for information relating to twelve present or former employees of the district and four present or former members of the school board. You inform us that the only responsive information relating to school board members consists of training records and will be released. You claim that the rest of the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the representative sample of responsive information that you submitted.¹ We also received and have reviewed the comments that the requestor submitted to this office.

Initially, we note that the submitted records include employment contracts that are subject to required public disclosure under section 552.022(a) of the Government Code. Section 552.022(a) provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

¹This letter ruling assumes that the representative sample of information that you submitted is truly representative of the requested information as a whole. This ruling neither addresses nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Thus, a contract that relates to the receipt or expenditure of public funds must be released under section 552.022(a)(3), unless all or part of that contract is expressly confidential under other law. Section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.--Dallas 1999, no pet.) (discussion of section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law," for the purposes of section 552.022(a), that makes information expressly confidential. You have not directed our attention to, and we are not aware of, any other law under which the employment contracts in question are expressly confidential. Consequently, the district must release the submitted employment contracts in accordance with section 552.022(a)(3).

You claim that the rest of the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documentation sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To sustain its burden, the governmental body must demonstrate: (1) that litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

In this instance, you assert that the requested information relates to two different lawsuits to which the district is a party. The pleadings that you submitted reflect that both of those lawsuits were pending on the date of the district's receipt of the requests for the information in question. Based on your comments and submissions, we conclude that the district has demonstrated that the information in question relates to pending litigation for the purposes of section 552.103. Therefore, the district may withhold most of the requested information under section 552.103.

We note, however, that section 552.103 does not permit the district to withhold information that the opposing party to the pending litigation already has seen or to which that individual previously has had access. The purpose of section 552.103 is to enable a governmental body to protect its position in anticipated or pending litigation by forcing a party seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to the litigation already has seen or had access to information relating to the litigation, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the plaintiff in the pending litigation already has seen or had access to the representative sample of information that you submitted. Therefore, the district may not withhold the submitted information under section 552.103.² Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Confidential information must not be released, however, even at the conclusion of the litigation. *See* Gov't Code §§ 552.007, .101, .352.

Although the submitted teacher evaluations are not excepted from disclosure under section 552.103 because the opposing party to the litigation has had access to them, the evaluations are confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.³ Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code

²We note that the submitted information includes the former employee's Texas driver's license number, which is confidential under section 552.130 of the Government Code, and her social security number, which may be confidential under section 552.117. *See* Gov't Code §§ 552.024, .117(1). You inform us, however, that the requestor is acting on behalf of the lawyers who represent the former employee as the plaintiff in the related lawsuits. The requestor therefore has a special right of access to the former employee's driver's license and social security numbers under section 552.023. *See* Gov't Code § 552.023(a) (providing that person or person's designated representative has special right of access, beyond that of general public, to information held by governmental body that is protected from disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 (1987). Please note that if the district receives a subsequent request for this information from a person who does not have a special right of access to it, you should request another decision and reassert your arguments against disclosure at that time. *See* Gov't Code § 552.352 (providing that release of confidential information is a criminal offense).

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 protects information that is encompassed by statutory confidentiality provisions.

§ 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 at 3 (1996). In that decision, we also determined that the word “teacher,” for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We also concluded that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* We have marked the submitted records that constitute teacher evaluations. Those records are confidential and must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code.

In summary, the submitted employment contracts must be released in accordance with section 552.022(a)(3) of the Government Code. Most of the other requested information is excepted from disclosure under section 552.103. The district may not withhold, under section 552.103, information that the opposing party to the pending litigation already has seen or to which she previously has had access. However, the district must withhold the submitted teacher evaluations, which are confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the

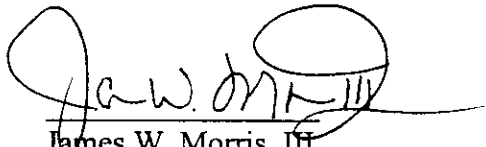
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', with a large, stylized flourish extending from the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 140750

Encl: Submitted documents

cc: Mr. Jamison Travis
Travis Investigations
P.O. Box 33281
Austin, Texas 78764
(w/o enclosures)